

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

THE HANOVER INSURANCE COMPANY,	)	
	)	
Plaintiff-Counterclaim Defendant,	)	
	)	
v.	)	Case No. 4:04CV00668 RWS
	)	
TMP INTERNATIONAL, INC., et al.	)	
	)	
Defendants-Counterclaim Plaintiffs.	)	

**STATEMENT OF UNCONTROVERTED MATERIAL FACTS  
IN SUPPORT OF THE JOINT CROSS-MOTION FOR PARTIAL SUMMARY  
JUDGMENT FILED BY THE HANOVER INSURANCE COMPANY AND CITIZENS  
INSURANCE COMPANY OF AMERICA**

The Hanover Insurance Company (“**Hanover**”) and Citizens Insurance Company of America (“**Citizens**”), pursuant to E.D.Mo. L.R. 7-4.01(E), hereby submit their Statement of Uncontroverted Material Facts (“**Statement**”) in support of their cross-motion for partial summary judgment against Todd McFarlane, Todd McFarlane Productions, Inc., and TMP International, Inc. (the “**TMP Parties**”).

For purposes of this Statement, Hanover and Citizens have cited to some of the TMP Parties’ exhibits to avoid unnecessary duplication of the record. The TMP Parties’ exhibits will be referred to as “**TMP Exhibit**.” Citations to exhibits filed by Hanover and Citizens shall be referred to as “**H/C Exhibit**.”

**THE PARTIES**

1. Todd McFarlane (“**McFarlane**”) is a citizen of Canada and a resident of the state of Arizona. McFarlane is currently an executive officer, director and sole shareholder of Todd

McFarlane Productions, Inc. and TMP International, Inc. McFarlane is an executive officer, director and majority shareholder of Todd McFarlane Entertainment, Inc. TMP Exhibit B at ¶ 2.

2. Todd McFarlane Productions, Inc. (“**Productions**”) is an Arizona corporation with its principal place of business in Arizona. TMP Exhibit B at ¶ 3; TMP Exhibit A19, vol. II B at 1619. Productions was incorporated in Arizona in October of 1994. H/C Exhibit 12.

3. Productions’ primary business operation is creating comic books. TMP Exhibit A19, vol. II B at 1597. As part of its operation, Productions produces artwork, stories, letter work and coloring work for its comic books, including Spawn. *Id.* Also as part of its operation, Productions also creates artwork for advertisements for its comic books. *Id.* Also as part of its operation, Productions creates letter pages for its comic books. *Id.*

4. Productions sends the artwork and copy for its comic books directly to the printer. TMP Exhibit A19, vol. II B at 1598. Productions also places the orders for printing its comic books. *Id.* at 1597.

5. TMP International, Inc. (“**International**”) is a Michigan corporation that was incorporated in February of 1994. TMP Exhibit AI-1. Before 2001, International’s principal place of business was in Plymouth, Michigan. TMP Exhibit A14 at 2121; TMP Exhibit A19 vol. II B at 1608-09; H/C Exhibit 17 at 10<sup>1</sup> (Deposition of Paul Burke, March 17, 2004, at 7).

6. International is a toy company. TMP Exhibit A19, vol. II B at 1500; H/C Exhibit 17 at 18 (Affidavit of Larry Marder In Support Of Defendant TMP International, Inc.’s Motion For Summary Judgment, at ¶ 3). International creates the toys based upon license rights it obtains from the holders of the intellectual property rights. TMP Exhibit A19, vol. II B at 1612.

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<sup>1</sup> For purposes of H/C Exhibit 17, the pages are counted consecutively for the entire exhibit regardless of the individual pleadings’ respective page numbering.

7. Some of International's toys have been made pursuant to license agreements it made with Productions, for Spawn toys, H/C Exhibit 17 at 18 (Affidavit of Larry Marder in support of Defendant TMP International, Inc.'s Motion For Summary Judgment, at ¶ 4), and the rock music group KISS, TMP Exhibit A19, vol. II B at 1610, and Dreamworks, for Shrek toys, *id.* at 1503-04.

8. Hanover is a New Hampshire corporation with its principal place of business in Massachusetts. Docket 74 at ¶ 6 (The Hanover Insurance Company's Answer to the TMP Defendants' First Amended Counterclaim).

9. Citizens is a corporation domiciled in Michigan with its principal place of business in Michigan.

#### **THE INSURANCE POLICIES**

10. Citizens issued Policy No. BC 0150845 00 to International on April 30, 1994. H/C Exhibit 1 at 1. International was the only "Named Insured" shown on the policy's Declaration page. *Id.* Policy No. BC 0150845 00 is for May 1, 1994 to May 1, 1995. *Id.*

11. International is the only "Named Insured" for Policy No. BC 0150845 00. H/C Exhibit 1. Productions was not a Named Insured or an additional insured. *Id.*

12. Citizens issued Policy No. MPC 0068902 00 to International on August 27, 1994. H/C Exhibit 2 at 1. International was the only "Named Insured" shown on the policy Declaration page. *Id.* Policy No. MPC 0068902 00 is an early renewal of Policy No. BC 0150845 00. The policy period for Policy No. MPC 0068902 00 is June 1, 1994 to May 1, 1995. *Id.* Productions was not a Named Insured for Policy No. BC 0150845 00 or an additional insured. *Id.*

13. Hanover issued Policy No. ZHH 4459213 to International on August 30, 1994. H/C Exhibit 3 at 1. International was the only “Named Insured” shown on the policy’s Declaration page. *Id.* The time period for Policy No. ZHH 4459213 is June 1, 1994 to May 1, 1995. *Id.* Productions was not a Named Insured or an additional insured for the policy. *Id.*; H/C Exhibit 5 at ¶¶ 4-6 (Declaration of Bert Foote).

14. Hanover issued Policy No. ZHH 4312739 to International on June 28, 1995. H/C Exhibit 4 at 2. International was the only “Named Insured” shown on the policy’s Declaration page. *Id.* The time period for Policy No. ZHH 4312739 is May 1, 1995 to May 1, 1996. *Id.*

15. Effective July 21, 1995, Policy No. ZHH 4312739 was amended to add Productions as an additional insured using form CG 20 26 11 85 (“**Form CG 20 26**”). H/C Exhibit 4 at 4-5. Form CG 20 26 provides: “WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented to you.” *Id.* at 5. Under the heading “Schedule,” Form CG 20 26 further provides: “Name of Person or Organization: TODD MCFARLANE PRODUCTIONS, INC.” *Id.*

16. Policy No. ZHH 4312739 was renewed two times. H/C Exhibit 4 at 11, 15. The first renewal had a policy period of May 1, 1996 to May 1, 1997. *Id.* at 11. The second renewal had a policy period of May 1, 1997 to May 1, 1998. *Id.* at 15. By endorsement, the policy period for the second renewal was extended for one month to June 1, 1998. *Id.* at 18.

17. Policy No. ZHH 4312739 was never amended to make Productions a Named Insured. H/C Exhibit 5 at ¶¶ 4-6 (Declaration of Bert Foote).

18. The policies referenced above each contained essentially the same relevant policy language. Policy No. ZHH 4312739 provided, in part:

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under the policy. . . .

The word “insured” means any person or organization qualifying as such under WHO IS AN INSURED (SECTION II)

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## **SECTION I – COVERAGES**

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### **COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY**

We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal injury” or “advertising injury” to which this insurance applies. . . .

This insurance applies to:

- (1) “Personal injury” caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;
- (2) “Advertising injury” caused by an offense committed in the course of advertising your goods, products or services;

but only if the offense was committed in the “coverage territory” during the policy period.

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#### **2. Exclusions.**

This insurance does not apply to:

- a. “Personal injury” or “advertising injury”:

- (1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
- (2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

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- b. “Advertising injury” arising out of:

\* \* \* \* \*

- (4) An offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting.

\* \* \* \* \*

## **SECTION II – WHO IS AN INSURED**

1. If you are designated in the Declarations as:

\* \* \* \* \*

- c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers, or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
2. Each of the following is also an insured:
- a. Your employees, other than your executive officers, but only for acts within the scope of their employment by you.

## **SECTION V – DEFINITIONS**

1. “Advertising injury” means injury arising out of one or more of the following offenses:
- a. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
- b. Oral or written publication of material that violates a person’s right of privacy;

\* \* \* \* \*

13. “Personal injury” means injury, other than “bodily injury”, arising out of one or more of the following offenses:

\* \* \* \* \*

- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services; or

- e. Oral or written publication of material that violates a person's right of privacy.

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Exhibit 4.

#### **SPAWN / TONY TWIST CHARACTER**

19. McFarlane created the Spawn character and comic book series in 1992. TMP Exhibit A19, vol. II B at 1610. McFarlane created the Spawn character and comic book series before Productions was incorporated in Arizona in October 1994. H/C Exhibit 12. International was incorporated in Michigan in February 1994. TMP Exhibit AI-1.

20. Spawn is a continuous series story. H/C Exhibit 22 at 35-36.

21. In 1992, McFarlane created a criminal mob boss character in *Spawn* No. 6 of the comic book series. H/C Exhibit 6A at 1, 3. *Spawn* No. 6 was printed in November 1992. *Id.* at 1-2. McFarlane wrote the story for *Spawn* No. 6 and is credited with creating the “pencils and inks.” *Id.* at 2. *Spawn* No. 6 listed McFarlane individually as the holder of the trademark and copyright for that issue. *Id.* (“Spawn is trademark <sup>TM</sup> and copyright © 1992 Todd McFarlane”).

22. The criminal mob boss character was subsequently named “Antonio Twist,” H/C Exhibit 6B at 3, and called “Tony Twist,” H/C Exhibit 6C at 2, “Tony Twistelli,” H/C Exhibit 6E at 2, and “Anthony Twistelli,” H/C Exhibit 6G at 2.

23. In *Spawn* No. 6, the Tony Twist character instructs his subordinates to “make sure he suffers before you kill him. Then bring me his heart.” H/C Exhibit 6A at 3.

24. In January 1993, McFarlane named the criminal mob boss character Antonio Twist in *Spawn* No. 7. H/C Exhibit 6B at 1, 3. *Spawn* No. 7 was printed in January 1993. *Id.* at 1-2. McFarlane wrote the story for *Spawn* No. 7 and is credited with creating the “pencils and

inks.” *Id.* at 2. *Spawn* No. 7 listed McFarlane individually as the holder of the trademark and copyright for that issue. *Id.* (“*Spawn* is trademark <sup>TM</sup> and copyright © 1993 Todd McFarlane”).

25. In *Spawn* No. 7, a narration describes “and so it goes. Antonio Twist tries to swallow up more power. His nickname on the street is ‘Dracula,’ because he lives to suck the power out of everyone.” H/C Exhibit 6B at 3.

26. In November 1993, the Tony Twist character is referred to and discussed in *Spawn* No. 15. H/C Exhibit 6C at 1-2. In *Spawn* No. 15, the Tony Twist character is described as a “criminal kingpin.” *Id.* at 2.

27. In early 1994, the Tony Twist character was depicted in *Inside Image* No. 15 in a discussion about the upcoming *Violator* comic book series. TMP Exhibit 79 at 7-10. *Inside Image* No. 15 was printed and distributed to newsstands and similar retailers in March 1994. H/C Exhibit 11 at 4.a (Affidavit of William D. Schanes).

28. In May 1994, the Tony Twist character appeared in *Spawn* No. 21. H/C Exhibit 6D at 1-4. In *Spawn* No. 21, the Tony Twist character was introduced as “Antonio Twistelli, a.k.a. Tony Twist, a.k.a. Dracula . . . mafia don and madman[.]” *Id.* at 2. In that same issue, the Tony Twist character said “If I find out he’s in any way connected to our mysterious hero, his balls are mine! Hell! Even if he’s not connected, we’ll dust him anyways! . . . A few deaths should do the job.” *Id.* at 4.

29. In May 1994, the Tony Twist character appeared in *Violator* No. 1. H/C Exhibit 7A at 1-6. In *Violator* No. 1, the Tony Twist character said “Okay, let’s whack the little sonuvabitch.” *Id.* at 2. Subsequently, in the same issue the Tony Twist character meets with a hired assassin to order that he kill one of the other *Spawn* characters. *Id.* at 4-6.



30. In June 1994, the Tony Twist character appeared in *Spawn* No. 22. H/C Exhibit 6E at 1-3. In *Spawn* No. 22, when discussing his plans to kill two other *Spawn* characters, the Tony Twist character said “You see, my good man - - I’m going to cleanse myself of two rather large nuisances this evening. One should be nearly finished. The other should be getting his invite to tonight’s party right now.” *Id.* at 3.

31. In June 1994, the Tony Twist character appeared in *Violator* No. 2. H/C Exhibit 7B at 1-2. In *Violator* No. 2, the Tony Twist character said “What’s goin’ on? I drive by here to see if my Admonisher has offed that demon-guy yet and all of a sudden the sky goes blooie!” *Id.* at 2.

32. In July 1994, the Tony Twist character appeared in *Violator* No. 3. H/C Exhibit 7C at 1-4. In *Violator* No. 3, the Tony Twist character knocked his assistant unconscious and intentionally left him to be killed by the *Violator* character. *Id.* at 1-4.

33. In August 1994, the Tony Twist character appeared in *Spawn* No. 23. H/C Exhibit 6F at 1-3. In *Spawn* No. 23, the Tony Twist character discussed how his two associates killed two F.B.I. agents. *Id.* at 3.

34. In September 1994, the Tony Twist character appeared in *Spawn* No. 24. H/C Exhibit 6G at 1-4. In *Spawn* No. 24, the Tony Twist character was described as a “New York mafia chief.” *Id.* at 2. In that same issue, the Tony Twist character said “I want you to make sure Overtkill did his job. I need Fitzgerald dead[,]” *id.* at 2, and “Send someone over to Gino’s restaurant. Take his top chef and slice off his hands. Gino needs to understand who runs this show[,]” *id.* at 3. Also in *Spawn* No. 24, McFarlane admitted that he used the name of Tony Twist, the hockey player, for the “Tony Twist” character. *Id.* at 4. McFarlane made this admission in response to a fan letter. *Id.*

35. In October 1994, the Tony Twist character appeared in *Spawn* No. 25. H/C Exhibit 6H at 1-5. In *Spawn* No. 25, the Tony Twist character is described as a “fat pig.” *Id.* at 2.

36. In November 1994, McFarlane admitted that he used the name of Tony Twist, the hockey player, for the Tony Twist character. H/C Exhibit 6D at 1-2. McFarlane made this admission in response to a fan letter in *Spawn* No. 20. *Id.* at 2.

37. In late 1994, the Tony Twist character appeared in *Hired Gun*. H/C Exhibit 8A at 1-3. *Hired Gun* was a comic book published by International. *Id.* at 1; H/C Exhibit 8C at 1-2. *Hired Gun* was printed and packaged in China with the Overt-kill toy International produced. H/C Exhibit 22 at 85-86 & 211. Production for the Overt-kill toy began in September 10, 1994. TMP Exhibit AF-1. The Overt-kill toy was sold in December 1994. H/C Exhibit 17 at 11 (Deposition of Paul Burke, March 17, 2004, at 11-12).

38. In *Hired Gun*, the Tony Twist character said “This guy’s making us look like morons! I want him dead!” H/C Exhibit 8A at 3.

39. In late 1994, the Tony Twist character appeared in *Breaking Ground*. H/C Exhibit 8B at 1-2; H/C Exhibit 8C at 3-4. *Breaking Ground* was also a comic book published by International. H/C Exhibit 8B at 1; H/C Exhibit 8C at 3-4. *Breaking Ground* was printed and packaged in China with the Tremor toy International produced. H/C Exhibit 22 at 85-86 & 211. Production for the Tremor toy began in September 10, 1994. TMP Exhibit AF-1. The Tremor toy was sold in December 1994. H/C Exhibit 17 at 11 (Deposition of Paul Burke, March 17, 2004, at 11-12).

40. In *Breaking Ground*, it is described how the character Tony Twist, “a dirtbag gangster” who “needed an enforcer,” made the Tremor character into a monster. H/C Exhibit 8B at 2.

41. International published *Hired Gun* and *Breaking Ground*. H/C Exhibit 22 at 45-47.

42. In 1996, Productions created the *Spawn Bible*, a book that provided a summary description about Spawn characters. H/C Exhibit 9 at 1; TMP Exhibit A19, vol. II B at 1733. In the *Spawn Bible*, the Tony Twist character was described and a summary of many, if not all, of his past actions was provided. H/C Exhibit 9 at 1.

43. In 1998, Productions created the *Book of Souls*, a book that provided a summary description about Spawn characters. H/C Exhibit 9 at 2; TMP Exhibit A19 vol. II B at 1734. *Book of Souls* was produced after Tony Twist filed his lawsuit against the TMP Parties. *Id.* at 1733-34.

44. In the *Book of Souls*, the Tony Twist character was identified as “Antonio Twistelli” and a summary of many, if not all, of his past actions was provided. H/C Exhibit 9 at 2. Aside from use of the “Antonio Twistelli” name instead of “Tony Twist,” the *Book of Souls* was essentially a republication of the *Spawn Bible* character description for the Tony Twist character. H/C Exhibit 9 at 1-2.

45. In 1996, Wizard magazine produced a special tribute issue about McFarlane and the *Spawn* comic book series. TMP Exhibit 1.

46. In the *Wizard Spawn Tribute*, Wizard created an article about how McFarlane named many Spawn characters after real-life people. TMP Exhibit 1. In that article, the Tony Twist character was said to be named after Tony Twist, a “former Quebec Nordiques hockey

player . . . , now a renowned enforcer (i.e., ‘goon’) for the St. Louis Blues of the National Hockey League.” *Id.* Subsequently in the *Wizard Spawn Tribute*, a brief description is provided for the Tony Twist character, including the first issue where he appeared (“*Spawn* #6”) and other issues where he appeared (“*Spawn* #7, #21-#25, #46; *Violator* #1-#3”). *Id.*

47. In 1994, Productions entered into a contract with Home Box Office, Inc. (“**HBO**”) for the animated television series broadcast rights to the story and characters in the *Spawn* comic book series. TMP Exhibit 26; H/C Exhibit 22 at 61 ; H/C Exhibit 13. As part of the agreement, Productions received one-half of the profits from the *Spawn* animated series. H/C Exhibit 13; TMP Exhibit 26; H/C Exhibit 22 at 61-62.

48. McFarlane was the creator and executive producer of the HBO animated *Spawn* series. H/C Exhibit 22 at 63; H/C Exhibit 14 at 1; TMP Exhibit A19 vol. II B at 1628-29; H/C Exhibit 15 at vol. I, 42. McFarlane, as well as others, wrote the story for the HBO series and he had input into its content. TMP Exhibit A19, vol. II B at 1628-29; H/C Exhibit 22 at 63; H/C Exhibit 15 at 139, 141.

49. The executive producer agreement between Productions and HBO required McFarlane to supervise all writing in connection with the *Spawn* animated series. H/C Exhibit 14 at 1. McFarlane was also required by the executive producer agreement to provide executive producer services throughout the production of the *Spawn* animated series. *Id.*

50. The story for the *Spawn* animated series followed the story of the *Spawn* comic book series. H/C Exhibit 22 at 63. All of the main characters of the *Spawn* comic book series were included in the *Spawn* animated series, including the Tony Twist character. The Tony Twist character appeared in all six episodes of the first season of the *Spawn* animated series. *Id.*

51. The first episode of the Spawn animated series was broadcast by HBO in May 1997. TMP Exhibit 85.

52. Productions entered into a license agreement with a company called Wildstorm to create Spawn trading cards. H/C Exhibit 22 at 56. The trading cards contained a picture of a Spawn character on the front of the card and a description on the back of the card that was about the character. TMP Exhibit A4 at 588-601. A Tony Twist character trading card was produced pursuant to the license agreement with Wildstorm. *Id.*; TMP Exhibit A18, vol. I at 604-05.

53. The Spawn trading cards do not indicate who sold the respective cards. TMP Exhibit A4 at 588-601. There was no evidence at the second trial that International sold any Spawn trading cards. McFarlane, the TMP Parties' corporate designee, testified that he did "not know" whether International sold any Spawn trading cards. Exhibit 22 at 8, 57.

54. Pursuant to a license right it obtained from Productions, International produced over 175 different toys based on the Spawn comic book series and movie. H/C Exhibit 17 at 18 (Affidavit of Larry Marder in support of Defendant TMP International, Inc.'s Motion For Summary Judgment, at ¶ 4). International never produced a toy based on the Tony Twist character. TMP Exhibit A14 at 2126.

55. Productions owned the license rights to most of the Spawn characters. TMP Exhibit A20, vol. III at 1895. International could not create a toy based on most Spawn characters, including the Tony Twist character, without Productions granting International a license right to create the toy based on the respective character. H/C Exhibit 21 at 60; H/C Exhibit 17 at 18 (Affidavit of Larry Marder in support of Defendant TMP International, Inc.'s Motion For Summary Judgment, at ¶ 4); TMP Exhibit RA-1. The license agreement would

allow the licensor to retain control of how its property is going to be used or for what purpose it could be used. TMP Exhibit A4 at 2178.

56. In 1996, Productions and International co-sponsored a “Spawn Night” at a junior hockey league game in Plymouth, Michigan. TMP Exhibit F. As part of “Spawn Night,” McFarlane appeared at the hockey game and signed autographs. TMP Exhibit A14 at 2133.

57. International gave away some of its products at the “Spawn Night” in 1996, including hockey pucks. H/C Exhibit 17 at 15-16 (Deposition of Paul Burke, March 17, 2004, at 28-29); TMP Exhibit A14 at 2133; TMP Exhibit A19, vol. II B at 1663. At the 2004 trial, Tony Twist’s attorneys questioned McFarlane about whether any *Spawn Bible* comic books were given away, but McFarlane said that he “did not know” whether any comic books were given away. TMP Exhibit A19, vol. II B at 1663-1665.

58. International never used Tony Twist’s name in the course of sponsoring the Plymouth Whalers junior hockey league team or the “Spawn Night” promotions. H/C Exhibit 17 at 16 (Deposition of Paul Burke, March 17, 2004, at 32); TMP Exhibit A14 at 2138. International never used Tony Twist’s name in the course of any advertising. TMP Exhibit A14 at 2138; TMP Exhibit A15 at 2466.

### **PUBLICATION**

59. Productions used Image Comics to coordinate production and distribution of the Spawn comic book series after issue number 10. TMP Exhibit A19, vol. II B at 1597-1600; H/C Exhibit 19 at 11-12<sup>2</sup> (Affidavit Of Marc Silvestri In Support Of The Motion Of Defendant Image Comics For Summary Judgment, at ¶¶ 6-9); TMP Exhibit A18, vol. I at 1297-98; TMP Exhibit A19, vol. II B at 1592. Before Image Comics, Productions used a company named Malibu

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<sup>2</sup> For purposes of H/C Exhibit 19, the pages are counted consecutively for the entire exhibit regardless of the individual pleadings’ respective page numbering.

Comics to produce and distribute the Spawn comic book series. TMP Exhibit A18, vol. I at 1297-98.

60. Image Comics was responsible for collecting money from orders, paying the printer, placement of “solicitations,” paying itself its fee and forwarding the remaining revenue to McFarlane or Productions. TMP Exhibit A19, vol. II B at 1597-98; H/C Exhibit 19 at 11-12 (Affidavit of Marc Silvestri in support of Image Comics’ Motion For Summary Judgment, at ¶¶ 8-9). Image Comics never changed one word of a comic book created by McFarlane. TMP Exhibit A19, vol. II B at 1597-98; TMP Exhibit A20, vol. III at 2127; H/C Exhibit 19 at 13 (Affidavit Of Marc Silvestri In Support Of The Motion Of Defendant Image Comics For Summary Judgment, at ¶ 15). Usually, Image Comics never reviewed McFarlane’s comic books until after they were printed. TMP Exhibit A19, vol. II B at 1597; TMP Exhibit A20, vol. III at 2127-28; H/C Exhibit 19 at 13 (Affidavit Of Marc Silvestri In Support Of The Motion Of Defendant Image Comics For Summary Judgment, at ¶ 15).

61. Image Comics did not function in the typical role that a publisher functioned. TMP Exhibit A20, vol. III at 1867. The evidence at the 2004 trial showed that Image Comics oversaw the printing of the comic books and coordinated the distribution of the comic books. *Id.* For the comic books it printed, Image Comics did not make any decisions regarding the content of any of the comic books, what books it would print, who would create the stories or who would draw the artwork. *Id.* The TMP Parties’ current counsel filed a pleading in the Underlying Suite that provided:

4. Each of the shareholders of Image Comics has his own comic book production company that creates comic books that are ultimately distributed under the Image Comics imprint. Additionally, comic books created by other production companies or independent producers are also distributed under the Image Comics imprint. (Ex. 1 at 5.)

5. Image Comics does not function as a publisher in any traditional sense of the word for the production companies owned by its shareholders. Instead, Image Comics acts as a manufacturing and distribution facilitator for its clients, who are comic book creators. (Ex. 1 at 6.)

Exhibit 19 at 5 (Image's Statement Of Uncontroverted Material Facts, at ¶¶ 4-5). McFarlane is one of the shareholders of Image Comics. *Id.* at 4 (Image's Statement of Uncontroverted Material Facts, at ¶ 2). Image Comics was formed by its shareholders so they could use Image Comics as a shell to coordinate printing and distribution of the comics. H/C Exhibit 15 at 92.

62. Image Comics is a "shell company" for the shareholders, such as McFarlane, that are comic book creators. H/C Exhibit 15 at 89. It only served to pass the comic books through from its shareholders' production companies to the printer and distributor. TMP Exhibit A20, vol. III at 1867-69. Image Comics was a centralized bureaucracy that oversaw the mechanical efforts of its various shareholders in their publishing activities. *Id.* at 1866-67.

63. McFarlane, and then Productions, created the *Spawn* comic books. H/C Exhibit 6A-6C. Image does not possess any rights in the *Spawn* comic book series. TMP Exhibit A19, vol. II B at 1600; H/C Exhibit 19 at 13 (Affidavit Of Marc Silvestri In Support Of The Motion Of Defendant Image Comics For Summary Judgment, at ¶ 15).

64. Productions' contract with Todd McFarlane Entertainment, Inc. ("**Entertainment**") provided that it, Productions, both produced and published the *Spawn* comic books. TMP Exhibit NN at 1 ("[Productions] acknowledges and agrees that it is the sole owner of the trademarks and copyrights, as well as literary and audio visual rights, to the property entitled 'Spawn', (hereafter the "Property"), a comic book produced and published by [Productions] for sale to the general public. . . .").

#### **TWIST'S LAWSUIT / JUDGMENT**

65. The jury instructions given to the jury in the second trial stated, in part:



Your verdict must be for Plaintiff and against Defendant Todd McFarlane if you believe:

First, Defendant Todd McFarlane used the name “Tony Twist” as a symbol of Plaintiff’s identify; and

Second, Defendant Todd McFarlane did so without Plaintiff’s consent; and

Third, Defendant Todd McFarlane did so with the intent to obtain a commercial advantage; and

Fourth, as a direct result of such use of the name “Tony Twist,” Plaintiff suffered pecuniary loss or Defendant Todd McFarlane received unjust pecuniary gain.

H/C Exhibit 20 at 2 (Instruction No. 11).

66. The jury instructions given to the jury in the second trial stated, in part:

Your verdict must be for Plaintiff and against Defendant Todd McFarlane Productions, Inc. if you believe:

First, Defendant Todd McFarlane Productions, Inc. used the name “Tony Twist” as a symbol of Plaintiff’s identify; and

Second, Defendant Todd McFarlane Productions, Inc. did so without Plaintiff’s consent; and

Third, Defendant Todd McFarlane Productions, Inc. did so with the intent to obtain a commercial advantage; and

Fourth, as a direct result of such use of the name “Tony Twist,” Plaintiff suffered pecuniary loss or Defendant Todd McFarlane Productions, Inc. received unjust pecuniary gain.

H/C Exhibit 20 at 4 (Instruction No. 14).

67. The jury returned a verdict in favor of Mr. Twist, and against McFarlane and Productions, for their use of Mr. Twist’s name, “Tony Twist.” H/C Exhibit 20 at 3, 5 (Verdict A, Verdict B).

**TENDER OF DEFENSE BY INTERNATIONAL AND  
RESERVATION OF RIGHTS**

68. On February 23, 1998, Jon Chick, International's general counsel, sent a letter to Kevin Sweet of Sweet & Associates, Inc., in Bingham Farms, Michigan. TMP Exhibit DD. In that letter, International's general counsel wrote: "As you had requested, enclosed is a copy of the legal proceedings referenced to above wherein TMP International, Inc. is a [sic] named as a defendant." *Id.*

69. The February 23, 1998 letter from Jon Chick was on International's letterhead. TMP Exhibit DD. The February 23rd letter does not refer to Todd McFarlane or Productions. *Id.*

70. In February 1998, Sweet & Associates sent a letter to report the lawsuit on behalf of International only. H/C Exhibit 10.

71. On April 6, 1998, Carolyn Coffman, a claims specialist for Hanover, sent Mr. Chick a letter only to International, reserving Hanover's right to deny indemnification or a duty to defend. TMP Exhibit HH.

72. The April 6, 1998 letter from Ms. Coffman provided a detailed description of Policy No. ZHH 4312739's terms and conditions for indemnity coverage. TMP Exhibit HH at 1-5. The April 6th letter also provided a detailed description of Policy No. ZHH 4312739's exclusions to indemnity coverage based on the policy's Personal Injury and Advertising Injury coverage. *Id.*

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 14, 2006, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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